No. 3199

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SHIPOWNERS AND MERCHANTS TUGBOAT COMPANY (a corporation), claimant of the American Steam Tug "Fearless", her boilers, engines, tackle, apparel and furniture,

Appellant,

vs.

A. H. BULL & COMPANY, INC. (a corporation),

Appellee.

BRIEF FOR APPELLEE

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

E. S. PILLSBURY,
F. D. MADISON,
ALFRED SUTRO,
OSCAR SUTRO,
Proctors for Appellee.

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I.

Statement of the Case.

The case involves liability for damage sustained by the steamship "Edith" on March 4, 1916, on the San Francisco water front. She was under her own steam, backing out of the slip at pier 44 assisted by the tug "Fearless", preparatory to proceeding to Hunter's Point. In the course of the ensuing maneuvers she

drifted with the wind and tide in the opposite direction from that which she was to take, colliding with pier 32, and sustaining the resulting damage for which libellant brought this action.

The master of the "Edith" planned to back his ship out of the slip, and intended, with the assistance of the tug, to turn her bow into the wind and tide and thus proceed in a southeasterly direction to Hunter's Point. He expected the tug to hold the stern line and to pull the stern of the "Edith" around to starboard while he turned the bow to port. In other words, he intended to pivot his ship.

At some distance from the slip the tug dropped the line without warning to the "Edith". The operation which the tug intended and attempted was to drop the stern tow line of the "Edith", circle around to her starboard bow, take a bow line, and pull the "Edith's" bow into the tide and wind—a sort of flying switch. This plan was not communicated by the tug's captain to the captain of the "Edith".

As soon as the master of the "Edith" learned that the stern tow line had been dropped by the tug, he stopped the "Edith's" engines, fearing otherwise to foul his wheel in the line. He relied on the tug to take care of the "Edith". The "Edith" drifted rapidly with tide and wind towards the piers. The tug took a tow line, which parted, and the "Edith" crashed against pier 32. The tug captain thought that no line could have kept her from striking the docks (316, 317).

The case for libellant was presented on the depositions of the master and mate of the "Edith".

The claimant, Shipowners and Merchants Tugboat Company, adduced the testimony of the three members of the crew of the tug, of the captain of the tug, of the superintendent of the company, of the general manager of the company, and of another captain in the employ of the claimant.

These witnesses testified orally before the learned District Judge who tried the cause, and who reached the following conclusions:

That the master of the tug was at fault because he failed to consult with the captain of the "Edith" as to the maneuvers intended by him before he undertook them; that he was also at fault because while the "Edith" was backing out and her wheels were turning, he, without warning, cast off a tow line which was fastened to the stern of the "Edith", and which was assisting her out of the slip; and that the accident was due to these faults. The trial court also found that while the "Edith" was drifting, the tug should have been prepared to pass her a line of sufficient strength to hold her, and should have passed such a line, which was not done. Regarding the claim that the "Edith" should have dropped her anchor, the court found that the "Edith" was not at fault in this respect, since she was entitled to believe that the tug would care for her properly. Responsibility for the damage was fixed on the tug (Opinion Hon. M. T. Dooling, Judge (354-5)).

It is the appellant's contention that the service here engaged for and rendered was an "assist" and not a tow, and that the dominant mind in the operation was that of the master of the "Edith". Whatever may have been the purpose and intent of the master of the "Edith" and of the captain of the tug in that regard, when the towage operation was first undertaken, it is obviously not within the functions of a tug performing an "assist" not only to determine the course of the operation, but to undertake it without notice to the tow. It is the appellee's contention that in whatever aspect the conduct of the tug is regarded, it was at fault:

First. If it be regarded as an assisting tug, because it failed to consult with the master, and, on the contrary, took it upon itself to act without instructions from him and in disregard of the "Edith's" proposed maneuver, and because it cast off the tow line without signal to or from the "Edith", thus putting her in danger; and

Second. If the operation be regarded as towage, for attempting a perilous maneuver in dangerous proximity to the piers for which the tug was not equipped and which it failed to accomplish.

II.

THE TUG CAPTAIN DID NOT CONSULT WITH THE MASTER OF THE "EDITH", BUT ACTED ON HIS OWN INITIATIVE WITHOUT NOTICE TO OR ORDERS FROM THE "EDITH". HE CAST OFF THE TOW LINE WITHOUT NOTICE. IN THIS HE WAS AT FAULT.

Counsel for claimant attempt but little explanation of the fact that the captain of the tug violated the first and most obvious duty of an assisting tug—to take and obey the orders of the tow. Indeed, the tug captain violated claimant's own inviolable rule on the subject. Thus Captain W. M. Randall, claimant's superintendent, said that in "assisting" the tug captain "always consults" (266). Clearly the rule which the tug captain failed to observe is merely a dictate of ordinary prudence. He testified on this subject as follows:

> "Q. What instructions did you get, if any, from the captain of the 'Edith'?
>
> A. I did not get any instructions from the captain of the 'Edith', except to go ahead.
>
> Q. Did you consult with him before you went out of the slip? A. No.
>
> Q. Did you have a talk with anybody at the office as to what should be done?
>
> A. Captain Randall, at the office, told me what to do.
>
> Q. What did he tell you to do?
>
> A. He told me to go up there and assist the ship to the drydock.
>
> Q. Did he say anything else? A. Nothing else.
>
> Q. When you got up to the 'Edith', did you have any consultation with the captain?
>
> A. No. (307)
>
> * * * * * * *
>
> Q. In an assist, you take the orders of the master of the vessel?

A. Take the orders from the master.

Q. You make the lines fast that he tells you?

A. We generally arrange it, making fast the line ourselves.

Q. You do not wait for his orders about that?

A. When I had enough I told him to make fast.

Q. DID YOU DROP THE LINE WHEN HE TOLD YOU TO?

A. IN THIS PARTICULAR CASE HE DID NOT TELL ME TO. (308)

* * * * * * *

Q. And in those cases in which you are not in charge, you get orders as to how it should be done; is that correct? A. Yes.

Q. Is that correct? A. Correct.

Q. So that in the case of an assist, you would be getting the orders of the captain, would you?

A. I would be getting the orders from the captain, yes. (309)

* * * * * * *

Q. You did not get any instructions from the master to let go? A. No.

Q. You used your own judgment?

A. I used my own judgment; when he stopped his engine, I thought it was time to let go." (313)

And in answer to questions by the court, the witness said:

"Q. Why did you cast off there 700 feet away from the wharf?

A. WELL, WE CAST OFF BECAUSE I INTENDED TO COME UNDER THE BOW OF THE SHIP AND GET A BOW LINE AND PULL HER AROUND.

Q. Did you have room enough for that?

A. I had room enough; if I had got the line I would have had room enough.

Q. You made no investigation or inquiry to find out whether there was a line you could get?

A. I never went aboard the ship; I didn't know what they had there.

Q. You undertook that maneuver without finding out what they had aboard ship?

A. I took the captain's word for that.
Q. What did he tell you?
A. He told me to pull the ship out of the wharf, from the wharf.
Q. *You didn't know what you were going to do, and you did not know what he was going to do?*
A. No." (330-331)

It appears quite clearly from the record that the maneuver which the tug captain had in mind when he left the slip was the one which he unsuccessfully undertook. The claimant's witnesses, Driver, Kraatz and the tug captain himself all so testified. The witness Driver said:

"Q. When you started out on this undertaking, you intended to pull her out here? A. Yes.
Q. And to drop the line? A. Yes.
Q. And to run around the bow and pick her up again and take her to Hunter's drydock?
A. Yes." (144 also 142)

The witness Kraatz testified that the maneuver undertaken by the tug was the way it was done "as a rule" (185); the tug's witness Boster said it was customary (206); the claimant's manager Gray said it was proper (249, 253), and the tug captain testified that he cast off the line in order to perform the operation which he undertook (330, 339).

But Captain Sandstrom's purpose, when the two vessels left the slip, was not disclosed by him to the captain of the "Edith" (327). The "Edith's" master had an entirely different maneuver in mind. If this was an "assist", did the tug captain have the right to undertake an independent maneuver, least of all without advising the captain of the "Edith" to that effect?

If it was an "assist", was the tug justified in pulling the ship out stern first into the wind and tide and dropping the stern line, which was holding the vessel up, without orders of any kind, particularly when such an operation would inevitably force the "Edith" to stop her engines and to drift in the direction of the piers?

Appellant claims that the tug was justified in casting off the line on the tug captain's interpretation of the "Edith's" intent, although the stern line was cast off too near the piers for the safe performance of what the tug captain undertook (see tug captain's testimony 339). But even if the "Edith" had signalled for the dropping of the line at an unsafe distance from the piers, the tug "should object to casting off", if it "thought there was going to be any immediate danger" (testimony claimant's witness Captain Randall 238). Much less was the tug justified in dropping the line at an unsafe point without a signal.

The claimant's witness George W. Driver correctly described the situation:

> "Q. Who took command of this operation?
> A. There were two men in command.
> Q. Two men in command?
> A. Yes." (137)

When he was ready to leave the slip, the master of the "Edith" gave the signal.

> "Q. Who gave the signal to the tug that time to go ahead?
> A. That time, you know, she was on Pier 44 and I told him to go ahead, waived my hand to the third officer and told the towboat to go ahead." (55)

He expected the towboat to swing the "Edith" around.

He said:

> "We wished our head to go to port, consequently we wished the tow to pull the stern in the opposite direction." (46)
>
> "I expected that he would turn to port, keep turning our stern." (36) (also, 57, 73)

After he was out some distance the mate signalled the master of the "Edith" to stop, as the line had been cast off, and within three or four seconds he stopped his engine. From the moment that the tug had cast off the line the master of the "Edith" naturally expected the tug to complete whatever maneuver it thus undertook. From that moment the "Edith" depended on the towboat. The master realized that the matter had been taken out of his charge (Dep. McDonald, 68).

It was the tugboat captain that told the man on the "Edith" to haul in the line (137-8). It was the tugboat captain who ordered his men to take the line off the bitts of the tug (174).

Not even when he dropped the stern line did he advise the "Edith" what he proposed to do (327), nor did he ask for a tow line from the "Edith" until they were both drifting together (328).

He undertook this ticklish maneuver without ascertaining what lines he could get. In response to the court he said:

> "Q. You didn't know what you were going to do and you did not know what he was going to do?
>
> A. No" (331); and in his final answer, that "it was confusion." (339)

But for the confusion and its resulting consequences, he was to blame.

The tug is bound to give proper instructions for the management of the towing.

Winslow v. Thompson, 134 Fed. 546;
38 Cyc., 565 (Note 81).

Here the master of the "Fearless" guessed at the "Edith's" intent—and guessed wrong. On his own admission he should have towed the "Edith" further into the stream, possibly a thousand feet further (339). He dropped the line at a point where his own maneuver could not have been properly performed, when there was no reason for not holding the line, and when by dropping it he rendered the movement intended by the master of the "Edith" impossible.

The prime, and, we submit, the sole, fault in the matter lay with the tug for placing the "Edith" in an emergency, and the gist of the case is, we submit, summed up in the testimony of the master:

> "Q. What do you think was the cause of this disaster?
> A. Getting the line in the wheel.
> Q. And what was that caused by?
> A. Caused by the towboat letting it go without any orders of any kind or even tooting his whistle." (Dep. Capt. McDonald, 78)

There is no dispute that the captain of the tug let go the tow line without orders so to do. He so admitted (308).

The mate of the "Edith" stated positively that the line was cast off without a signal from or to the

"Edith" (83-85) (Dep., Sivert Hansen) and that the line was dropped before anyone on the "Edith" knew any thing about it and while its whole length was in the water (98). The captain of the "Edith" testified that he gave no signal to cast off (36), but on the contrary expected the tug to hang on until the customary signal had been given to cease towing (45-6).

Notice of intention to case off must always be given by the tug.

The O. L. Halenbeck, 110 Fed. 556;
Frost v. Ball, 43 Fed. 170;
The J. P. Donaldson, 21 Fed. 671.

III.

THE TUG'S MANEUVER INEVITABLY INVOLVED THE "EDITH" IN DANGER.. AFTER THE LINE WAS CAST OFF, IT WAS NECESSARY FOR THE "EDITH" TO HAUL IT IN BEFORE SHE COULD USE HER ENGINES—AND WHILE HER ENGINES WERE STOPPED SHE WAS BOUND TO DRIFT TOWARD OR AGAINST THE PIERS.

This is clear from the testimony of claimant's witnesses. Thus the tug witness Driver testified:

> "Q. When you towed him out of Slip 44, you expected to bring him out here and drop the line and come around and catch him on the bow, didn't you? A. Yes, sir.
>
> Q. And you knew that while you were doing that he was going to drift?
>
> A. We would have the time to do it up there in that position, we would have time to get a hawser up.

Q. You knew he would drift, didn't you?
A. Not to such an extent. (142)

* * * * * * *

Q. *You knew he would have to stop his engines to pull in to that line?*
A. *Most assuredly.* (143)
Q. And while he was hauling it in, his engine would be stopped? A. Yes.
Q. And he would drift?
A. To a certain extent.
Q. He would drift for all the time it took to haul in that rope? A. Yes.
Q. That is correct, is it? A. Yes.
Q. And then you expected to go around on his bow and give him another line? Is that right?
A. Yes.
Q. And you didn't have a line ready?
A. We had a hawser ready.
Q. Didn't you say you couldn't pass that to him?
A. I was speaking of the emergency that we were in at that time." (143-144)

The witness Kraatz, the second tug witness called by claimant, testified to the same effect:

"Q. You have performed that maneuver before, have you? A. Yes.
Q. You expected the engines of the vessel to stop, didn't you, while they are taking in the line when you cast it off? A. Yes.
Q. Otherwise it is likely to foul the wheel?
A. Otherwise it is likely to foul the wheel. (186)

* * * * * * *

Q. You would expect the 'Edith to drift?
A. She would drift a little, I suppose.
Q. She would be bound to drift some distance?
A. She would be bound to drift some distance." (186)

It took the tug four minutes to get around amidship of the "Edith" (337), and the tug captain testified

that he knew that after the line had been dropped she would inevitably drift toward the piers.

"Q. When you cast off that stern line, you knew how much wind and tide there was, didn't you?
A. Yes, I knew.
Q. You knew that a ship drifting with that wind and tide would gather headway, didn't you?
A. Yes.
Q. And would keep drifting faster, and faster, and faster? A. Yes.
Q. And your idea, nevertheless, was to drop that line off the stern, run around and get one off the bow, and head her upstream?
A. *My idea was to tow the ship further out; I would have towed her further out in the stream.*
Q. *How far would you have towed her out?*
A. *Possibly a thousand feet further; but when the captain stopped backing I came to the conclusion that he wanted me to let go; otherwise, he had no reason to stop backing; I could have kept on backing out into the stream.*
Q. *That was your judgment?*
A. *That was my idea of it.*
Q. *That was your idea of his conclusion?*
A. *Yes.*
Q. *Now if, in point of fact, his idea was that you should hang on to his stern, as he has testified, then your idea as to what he wanted was a mistaken idea: Was it not?*
A. *It was confusion.*" (339)

The expert Gray, manager of the claimant, likewise said that the wheel should not be turning while the stern line was being hauled in.

"Q. Would you have the wheel turning astern while it was being hauled in? A. No, sir.
Q. It would foul, wouldn't it?
A. It might foul. (254)
* * * * * * *
A. *I say no. I would stop the propeller while I was getting that line in.*" (255)

And yet the same witness said that when the line was cast off by the tug, the "Edith" should have backed while the tug came around to her bow! (250).

And, finally, the tug captain admitted that after the line was cast off proper seamanship required that the captain of the "Edith" should stop his wheel.

> "Q. You would not approve starting an engine if there was a 20 or 25-fathom line over the stern of the ship hanging in the water?
> A. In what direction do you mean? Either direction?
> Q. Yes.
> A. Well, if the line was tight, it would not make any difference.
> Q. If it was hanging in the water?
> A. No, I would not approve of it.
> Q. As a matter of fact, every seaman always has in mind keeping his wheel clear of a line that has been cast off, hasn't he? A. Correct.
> Q. And always aims so to operate that his wheel won't become foul when a line is cast off?
> A. Correct.
> Q. *If, then, there is danger of the line fouling, he stops his engine, does he not, until it is in?*
> A. *Yes.*
> Q. *That is good seamanship?*
> A. *That is seamanship, yes.*" (324-325)

And subsequently Captain Sandstrom testified that if he backs it is apt to catch on either side if it hangs in the water and he said that if the "Edith" had been backing "the suction of the water will pull the line in there" (326).

At the time the tow line was dropped the "Edith" was about 700 feet from the piers and had out one hundred and fifty feet of line, and according to the

master of the tug it would take five minutes to haul this in (330); according to witness Kraatz, six minutes (176). During this time the "Edith's" wheel would be stopped. It took the "Fearless" four to eight minutes to get to the bow of the "Edith" (claimant's witness Capt. Sandstrom, 330, 337). The "Edith" in any aspect of the case, would be drifting practically until the "Fearless" took a tow line (330). The tug, we submit, had no right to undertake the operation so close to the piers and on so close a margin of time.

A three knot tide means that the tide is running at the rate of 18,240 feet an hour, or 304 feet a minute (315). Added to this was a wind blowing not less than eighteen miles an hour (the captain of the "Edith" estimated it at more). The "Edith", while drifting, would gather headway rapidly (Capt. Sandstrom, 339), and drift 1800 feet while the "Fearless" got around to her starboard bow (ib. 330, 338-9).

In other words, the operation the captain of the tug undertook involved placing the "Edith" in a position of danger and he himself admitted that she should have been towed further out into the stream (339).

The emergency thus created would not have arisen, *first,* if the tug which took the tow line on the order of the master had held on to it until the "Edith" directed that it should be released; *second,* if the tug, intending to perform the maneuver which it undertook, had towed the "Edith" further out from the piers, so that she would not have drifted too close to the piers to save her during the time which would necessarily elapse while she was hauling in the stern tow line.

The master of the "Edith" was justified in not expecting the tug to drop the stern line without a signal of any kind, or even "the customary tooting of the whistle"; and the captain of the "Fearless" was grossly at fault in attempting to convert an "assist" into a towage operation at a point where the maneuver which the tug undertook could not have been safely performed.

Since the casting off of the "Edith's" stern line required the master of the "Edith" to stop his engine it made little difference in the subsequent events whether (a) the master stopped his engine because he thought the line was already in the wheel, or (b) whether in point of fact it had already fouled the wheel, or (c) whether he stopped his engine in order to haul in the line, so that it would not foul the wheel. *The essential point is that under all the rules of seamanship his engine had to be stopped; and while his engine was stopped, his vessel was helpless and was bound to drift.* For this condition the "Fearless", which cast off the stern line, was responsible.

IV.

THE TUG WAS CLEARLY AT FAULT FOR CASTING OFF THE STERN TOWING LINE AT A TIME WHEN THE "EDITH'S" ENGINES WERE TURNING, THUS CAUSING HER WHEEL TO FOUL BEFORE IT COULD BE STOPPED.

The answer admits that the line was cast off after the "Edith's" engines were started ahead (answer 22).

Captain Gray, general manager of the claimant, who verified the answer (25), said this was incorrect (265). It is likely that Captain Gray's statements in the answer, made shortly after his investigation of the facts of the case, are more reliable than his recollection on the witness stand more than a year after the event. The mate of the "Edith" testified that the vessel's engines were moving ahead when the tow line was cast off (97). The line was in the water and the wheel fouled before the master of the "Edith" could stop his engines, the mate meanwhile hauling it in (78).

It is asserted by the claimant that the loop of the line being around the wheel shows that most of it was hauled in. But it appears that two pieces of line were wrapped around the wheel. How much the mate of the "Edith" could get in while the captain was stopping his engines, how quickly they could be stopped completely, which parts of the line were cut, how much was hauled in after the engines were stopped, whether the loop fouled at the time or later when the vessel left Pier 32 and proceeded to the drydock, are all matters of conjecture, which, we submit, can not prevail against positive and direct testimony.

In any event immediately after the tow line was cast off

> "a signal was *at once* given to the master of the steamship 'Edith' by the mate of the said steamship who was standing on the poop deck that the tow line had been cast off by the master of the tug 'Fearless'." (Claimant's answer, 15; Test. Hansen, 85)

More, the mate of the "Edith" could not do.

With respect to the casting off of the line, the claimant called four witnesses, the crew of the tug, including the men who actually hauled the line on the tug. They testified before the trial judge. From their more or less confused statements on the subject the trial court reached the conclusion:

"He", the master of the tug, "was also at fault in casting off the line without warning and while the 'Edith's' wheels were turning" (355).

That conclusion, supported by oral testimony and conforming to the averments of the claimant's answer, should not, we submit, be here reversed (infra p. 60).

Some point was made on the trial in respect to the distinction between taking the line off the bitts on the tug and casting it overboard. But it appears quite clearly that when the line was removed from the bitts, the men could not long hold it against the tide and wind.

The witness Kraatz, who held the line on the tug, said he had to let it go because of the weight; he could not hold it up any longer (187-8), and his companion Taylor said the line was taken off the bitts while the "Edith's" engines were turning, and pulled out of the deckhands' hands by the tide (192, 197).

Kraatz said:

> "I took it (i. e., the line) off the bitts and held onto the line as long as I could and then I let go" (162);

and obviously a 30 fathom tow line could not be held long in a strong tide and wind, with the other end fastened

to a 2700 ton steamer. When the line was taken off the bitts it was equivalent to casting the line off the tug.

It is argued that the tug captain correctly interpreted the "Edith's" intention by casting off the line after her engines were stopped. The difficulty with this assumption is that the captain of the tug as the event showed *incorrectly* interpreted the "Edith's" intentions. In any case if we are to believe the claimant's witnesses who testified that the "Edith" was backing at the time the line was cast off, the tug captain was at fault for taking the line off his bitts with the "Edith's" propeller going astern; if the testimony that the "Edith's" propeller was moving forward is to be believed, the captain of the tug was at fault for casting off while the vessel's propeller was moving; and if the testimony of the captain of the "Fearless" is to be believed, that the "Edith's" engines were stopped when he cast off, the answer is that there was no occasion and no emergency which compelled him to drop the line without instructions. In any aspect of the case, therefore, the captain of the "Fearless" was at fault for dropping the line without a signal to or from the "Edith".

V.

THE TUG WAS AT FAULT FOR NOT PASSING A LINE TO THE "EDITH" AFTER PLACING THE "EDITH" IN PERIL.

The learned District Judge found that

> "The 'Fearless' should have passed to the 'Edith' after letting go of her and while she was drifting a line of sufficient strength to hold her and should

have been prepared to do so. This was not done." (298)

The tug had a number of six inch and seven inch lines on board, besides a twelve inch hawser. No attempt was made to pass any of these to aid the "Edith" after she was set adrift. The reasons assigned by the witnesses for the claimant are extraordinarily conflicting.

The "Fearless" was at fault for not passing up its twelve inch hawser.

In the stern of the tug "Fearless" lay a twelve inch hawser which the "Edith' wanted and failed to get in her distress. It was afterward used to tow her into drydock (297).

In the libel it is alleged that the master of the tug was not prepared with a line, and was unable to pass one to the "Edith" after going around her, though requested to do so by the first officer of the "Edith" (7).

The failure to pass the hawser was, we submit, a gross fault. It is explained in so great a variety of ways by the tug's witnesses that we submit no credence can be given to any of the numerous theories advanced by claimant, except that the hawser had not been engaged for.

The tug captain testified with great positiveness that no one on the "Edith" asked for a line, that there was no argument under the bow of the steamer on the subject, and that there were no words spoken about it.

"Q. You did not hear the mate ask for the 12-inch hawser when you were somewhere near this position? A. No.

Q. Just before you got here? A. No.

Q. You did not hear anyone on your tug refuse to pass that hawser? A. No.

Q. You personally did not refuse to pass it?

A. I did not refuse to pass it because I was not asked for it there.

Q. I am asking only about the time before you got into this position here.

A. *In fact, I think if they had asked me for the hawser in that position I would have been compelled to give it to them.*

Q. You did not hear the mate say, 'That is a bum tugboat, it has no lines'?

A. No, I did not hear that.

* * * * * * *

Q. You heard no discussion of any kind there?

A. No.

Q. You say now positively that you were not asked for that hawser while you were out there in the stream? A. No, I was not, positively.

* * * * * * *

Q. It is alleged in the answer here that the first officer of the steamship 'Edith' asked the tug to pass a large 12-inch hawser. Do you know of whom that was asked?

A. No, I don't know anything about that." (321-2)

This strenuous denial by the tug captain that he refused to pass a 12-inch hawser, *which he admits he would have passed if it had been asked for* (and which we believe was not passed up merely because it had not been engaged for the sum of five dollars) (see testimony of claimant's manager, Captain Gray, 269-270), is contrary to the admissions of the answer, which are that the claimant

> "*does admit that the first officer of said steamship asked said tug to pass a large 12-inch hawser lying on the stern of said tug, but that said hawser was*

so heavy that the men on the forecastle head of said 'Edith' would not have been able to have taken said hawser aboard, and it would not have been practicable to have passed said large hawser at the time.'' (16)

The tug captain is further impeached on this subject by the testimony of the other witnesses for the tug. The witness Driver, the first witness called, testified:

''Q. Did you hear the officer of the 'Edith' ask you for a line? A. Yes.'' (141)

The next witness for the claimant, Kraatz, testified:

''Q. What transpired when you reached the bow of the 'Edith'?

A. There was an argument started as to who was going to pass a line.

Q. What was the argument?

A. The mate hollered from the forecastle-head, 'The bum towboat hasn't got lines'. The skipper sung out to the mate, 'You couldn't pull up that line if I gave it to you'. That lasted for about three minutes.'' (164)

* * * * * * *

''Q. You said that when you went around to the starboard bow of the 'Edith' there was an argument there about the line? A. Yes.

Q. The officer on the 'Edith' wanted the tug to pass his hawser? A. Yes.

Q. And the tug wanted the officer to pass a line to the tug? A. Yes.

Q. The tug was directly under the bow of the 'Edith'? A. Yes.

Q. If you were going to pass a line from the tug to the 'Edith' you could not have been in any better position to do it, could you, if you were out in the stream?

A. That was as near as we could get.'' (177-8)

We submit it may fairly be assumed that Captain Sandstrom's recollection on this matter as given on the trial is in error. He himself testified that he reported the occurrences in question immediately after the event at the office of the claimant (303), that he had not discussed it much since (303), and was therefore giving his recollection as of the date of the occurrence in March, 1916. His recollection more than a year after the occurrence is not as valuable as his knowledge of the occurrence on the day of the happening, and the answer obviously was prepared on the report made to the claimant's officers. The admission in the answer, therefore, and the testimony of three witnesses that the "Edith's" mate asked for the line, is obviously correct. Some of the witnesses for the claimant said that the hawser was too heavy to pass to the "Edith". But according to the captain of the tug, no opportunity was given to the "Edith" to take it aboard. The answer averred that it was not suitable for the purpose of performing the towage operation in question. Some of the claimant's witnesses said that the hawser was suitable for the purpose, but would require more men than were on the forecastle deck of the "Edith" (145).

The captain of the tug thought six men could have hauled it aboard (334). Captain Randall thought three to four men could have handled it (243). But as the tug captain says that the "Edith' did not ask for the hawser, and Gray says that if she had he would not have passed it up, it matters not how many men were required to haul it up.

One of the witnesses said it would have been passed to the "Edith" but it had not been engaged for. It seems that the price for the use of the tug's hawser would have been five dollars (247-8), and the closing question and answer put to Captain Gray, the manager of the claimant, indicate that it was the failure to have an agreement for the payment of this sum which resulted in allowing the "Edith" to drift on to pier 32.

> "Q. Now, captain, if the 'Edith' had engaged for the tug's lines, or if she had an understanding with you that in case she wanted them she was to have them, would that 12 inch hawser have been passed up to the 'Edith'? A. Yes, sir." (269-270)

And, again:

> "The only reason it was not passed out is that it was not engaged for." (259)

On the testimony of those witnesses of the claimant who said that the hawser was suitable for the towage operation in question, given sufficient time or sufficient men, it would, of course, have been possible to have passed it to the "Edith". It nowhere appears that the captain of the tug or anyone else on the tug asked for more men on the forecastle head of the "Edith" to haul up the hawser.

Furthermore, the deck of the "Edith" was only twenty-four feet above the deck of the "Fearless" (324). The wire pennant which was attached to the hawser weighed three and one-half pounds to the foot (242). Twenty-four feet would have taken the pennant on board the "Edith" and would have weighed eighty-four pounds. It is not apparent that in spite of the

friction three men could not have pulled a one and one-half inch pennant, weighing eighty-four pounds, through the chock of the "Edith", which must have been large enough to accommodate a twelve inch hawser. Nor is it apparent why more men would not have been prepared on the "Edith" to take the wire pennant in question, if more men were required. It must be concluded, we submit, from the testimony of the captain of the tug, as well as from the testimony of the general manager of the claimant, that neither the hawser nor any other line was passed to the "Edith" because the tug declined to do so.

The "Fearless" was at fault for not being prepared with and passing one of her seven inch lines.

Equally inexcusable is the conduct of the "Fearless" in not having on board or in failing to pass one of her 7-inch lines to the "Edith". While the claimant made much in the court below of the rotten condition of the line which was passed by the "Edith" in the emergency in which she had been placed by the "Fearless" (see answer to libel 22, 24, also, test. tug captain 293) *the tug's witness Kraatz testified that there was no line other than the 12-inch hawser on board the "Fearless" which was as good as the line which was passed by the "Edith"* (184-185). After he had been questioned about all the lines on the tug he testified:

> "Q. None of these lines were as good, as I understand you, as the line which you got from the 'Edith'? A. No." (185)

Captain Gray, claimant's manager, indignantly denied this (263), and said the lines were all good but

suitable only for short jobs. The captain of the tug, the principal witness for claimant, said the six inch lines were bad (316), but the seven inch lines were good. But he testified:

> "Q. Why couldn't you have passed the 'Edith' one of your good 7-inch lines with the 6-fathom wire when you were under the bow there?
> A. I didn't see any men while I was waiting under the bow there." (318)

Later he changed this:

> "Q. And you say that the reason you did not pass up one of your own 7-inch lines was that you did not see any men on the forecastle deck?
> A. That is not the reason; *because I was not asked for any of these 7-inch lines.*
> Q. The reason you did not pass up a 7-inch line is because there were——
> A. They did not ask me for it." (322)

The statement in the claimant's answer that the first officer of the "Edith" asked the tug to pass its hawser, was then called to the attension of the witness and he took the ground that the seven inch lines were too short for the service (322). But the seven inch lines with pennant were twenty-six fathoms long and the full amount of line taken when the vessels left the slip was twenty to twenty-five fathoms. The captain of the tug admitted that in an emergency a twenty-six fathom line could have been used to hold the "Edith" (323).

Was the tug justified in attempting this maneuver without either proper lines on board or ascertaining what lines the "Edith" had for use in this strong tide and wind?

If the twelve inch hawser in question and the seven inch lines were not suitable for the towage operation which the tug undertook was it not the duty of the tug to have on board some equipment that would be suitable? When the master of the "Edith" engaged the tug he asked "to have a boat ready to help me to the dry-dock" (Dep. Henry McDonald, 30). Was the "Fearless' ready? Was such equipment aboard as she should have had?

The tug's equipment must be sufficient for the undertaking, otherwise the tug is at fault.

In *Gilchrist Trans. Co. v. Great Lakes Towing Co.*, 237 Fed. 432, it is said:

> "If an accident can be * * * attributed to the inadequacy of the tow to perform the service she has undertaken, then she has not fulfilled her full measure of duty to the tow."

The tug is bound to furnish safe and sound appliances.

38 Cyc. 564.

A tug which is insufficiently equipped with hawsers is at fault for any resulting accident.

Baker-Whitely Coal Co. v. Neptune Navigation Co., 120 Fed. 247.

In the case last mentioned a tug made fast a hawser to the port quarter of the "Wilhelmina". The Wilhelmina" was then asked for another rope which was also made fast. When the hawser taken from the "Wilhelmina" was tightened it parted and the propeller of the steamship struck the pier out of which she was being towed. It was held that the "Wilhelmina" was

not even partially liable for the injury, the court saying tugs

> "should be duly equipped for such services. Such equipment includes sufficient hawsers. There was no special danger in the work required of the tugboat 'Britannia'. * * * The port was the home port of the tug, where the required equipment could have been obtained. * * * The testimony shows that the tug was not properly equipped with hawsers and that it was compelled to borrow one from the steamship."

It was pointed out in that case that the action of the tug rendered the steamer helpless, though it had employed her only for the purpose of assisting her with the tug's ropes. The "Wilhelmina", it was pointed out, might have backed out with her own steam had she not relied on the tug.

It is, of course, apparent from the record that the captain of the "Edith" had no idea that the "Fearless" would attempt the maneuver which it undertook. He could not be expected to be prepared with a line at the "Edith's" forecastle head.

The answer alleges that the line which the "Edith" passed when she was *in extremis* was rotten and insufficient (22). No blame can attach to the "Edith" for not being prepared with a line at her bow when she expected no towing service except from her stern. There was no time to bring up a good line when she was as close to the piers as the tug's maneuver and failure to care for her, left her.

And, finally, Captain Sandstrom, who said that his 7-inch lines were in good condition, testified that even a

good line would probably not have prevented the "Edith" from striking (316, 317, 323). In other words, by the time she had drifted to her point of danger, if the line which she passed from her bow to the tug had held, she nevertheless would have struck the dock. *This testimony from the master of the "Fearless" himself condemns the maneuver which he undertook, and which he admits could not have been performed even with a sound line.*

The testimony on this subject in this case was that of the captain of the "Fearless", members of her crew, and of the manager of claimant. These witnesses testified in open court before the trial judge. His conclusion from their evidence that the tug was at fault in not being prepared with proper lines and in failing to pass one to the "Edith" should not, we submit, be disturbed unless clearly against the weight of evidence (infra pp. 60-63).

The tug, we submit, was grossly at fault in refusing to pass the line asked for; the excuse offered by the general manager of the claimant, that the line had not been engaged for, was insufficient and the tug should not have attempted the maneuver which it did without full and adequate equipment to perform it.

VI.

THE TUG CANNOT JUSTIFY ITS FAILURE TO PERFORM ITS ATTEMPTED MANEUVER BY A CLAIM THAT THE "EDITH'S" PROPOSED MANEUVER WAS NOT FEASIBLE.

When the tow line was taken off the tug's bitts, which was equivalent to casting it off, without signal or order

from or to the "Edith", the tug took the operation into its own hands. The maneuver contemplated by the master of the "Edith" then became impossible of performance. Unless the tug turned the stern of the "Edith" to starboard, the bow could not be turned to port. On the other hand the tug captain admitted that at the time he cast off, his tug's position was such that he could have turned the vessel's stern to starboard as well as he could have from any other position (312). It was his view that this could not be done against the wind (311) although the master of the "Edith" thought otherwise (Dep. Henry McDonald). The "Edith's" helm was starboard, her propeller moving ahead, all of which the tug's captain saw and knew. He could "readily" see the wheel (324). There was only one maneuver possible with these two factors, that was to pivot the ship by turning her bow to port while her stern went to starboard, but the captain of the tug did not think it the proper maneuver. As he himself said, he used his own judgment and let go, and from that moment, having made the captain's plan of turning into the wind and tide impossible of performance, the "Fearless" took the responsibility of turning the vessel around.

The tug cannot escape responsibility on the ground that because the captain of the tug was not aboard the "Edith" he was not in charge of the operation. One of claimant's witnesses, Captain Boster, admitted that at times when in charge of a tow the tugboat captain is on his tug, and on the tow only when the tug is lashed alongside (219-220). Claimant's witness Captain W. M.

Randall also knew of cases where the tugboat captain took charge of undocking steamers without being on the bridge (236).

As these were claimant's own representatives their testimony should be conclusive on the point.

The captain of the "Edith" testified that he wanted to turn his vessel to port on a starboard helm, and to have the "Fearless" hang onto his stern, pulling the stern to starboard, thus pivoting his ship in the direction of Hunter's Point.

> "Q. What procedure did you expect the tow to follow in towing you out?
> A. I expected that he would turn to port, keep turning our stern.
> * * * * * * *
> Q. Did you give any signal to the tugboat to cast off her line?
> A. No, I did not." (Dep. McDonald, p. 36)

> "Q. Is it customary for the ship to assist in turning by the use of her own engine. A. Yes.
> Q. How does she generally do that?
> A. By going ahead either starboarding or porting her wheel as the case might require.
> Q. And the tugboat, during this maneuver, does what?
> A. Does the pulling around and down to the ship's head in the same direction.
> * * * * * * *
> Q. In this case when the 'Fearless' was taking you out?
> A. We wished our head to go to port, consequently we wished the tow to pull the stern in the opposite direction." (Dep. McDonald, 45-46)

> "Q. And you say that you had anticipated that he would swing your stern to his port, and to your own starboard?

A No, swing my bow to port and swing the stern around to starboard.

Q. He was made fast to your stern? A. Yes.

Q. And you anticipated that he would swing your stern to your starboard, did you not?

A. Yes." (ib. 57)

The experts summoned by the claimant—all of them officers or employees of the claimant—testified that the maneuver proposed by the master of the "Edith" was not feasible.

Both the first and the second experts called by the claimant, Captains Boster and Randall, thought that the captain's proposed maneuver was not the proper method of turning the vessel because of the wind and tide.

> "Q. Then the principal reason, really—isn't that a fact—that the principal reason why you think that the captain's way of trying to do this thing on that day was not possible, was because there was a strong ebb tide and strong southeast wind; isn't that so? A. Yes." (Captain Boster, 218)

Captain Randall thought that it was the proximity of the dock which was the principal objection to the manner in which the captain of the "Edith" intended to turn the vessel.

> "Q. Which leads me to ask you if it is not a fact that the objection to that maneuver is one based largely on conditions; there are conditions when it can be done and conditions when it cannot be done?
>
> A. Close to the dock is the principal condition you have to consider.
>
> Q. And the tide and the wind?
>
> A. Tide and wind would be the second condition." (240)

And he thought the maneuver which the "Edith" wanted to perform could possibly have been done a half

a mile away from the dock (235). And Captain C. Randall, the fourth expert summoned by the claimant, thought that Captain McDonald's proposed maneuver could have been performed in the absence of wind or tide (275).

The gist of the claimant's testimony is that the "Edith" was too near the docks to turn the vessel in the manner in which the captain of the "Edith" proposed to turn it. In point of fact, as the event developed, she was not out far enough for the performance of the maneuver which the "Fearless" undertook; and as the "Fearless" dropped the tow line, she must be responsible for the fact that the "Edith" was too close to the dock to be turned with safety by either maneuver.

The captain of the "Edith" was certain that he could have turned his ship as he planned. Does it lie in the mouth of claimant whose tug rendered the "Edith's" maneuver impossible, to claim that it could not have been safely performed?

VII.

THE MASTER OF THE "EDITH" WAS NOT AT FAULT FOR NOT DROPPING HIS ANCHORS.

The tug's maneuver contemplated that the "Edith" should stop her engines, drifting while hauling in the stern line. *As the tug intended to take a bow line and tow the "Edith" against tide and wind, dropping the anchors of the "Edith" would have prevented the tug's maneuver.* The master of the "Edith", after the tug cast off the line, expected the tug to take charge (Dep. Henry McDonald, 67-68).

Had the tug been prepared with proper lines, or attempted the maneuver at a greater distance from the piers, the captain's failure to drop his anchors could not be urged. The "Edith" most assuredly would have assumed the responsibility of rendering the tug's proposed maneuver impossible by dropping her anchors at any time between the casting off of the stern line and the tug's taking of a bow line. But this was the only period of time during which, from the testimony of all of the witnesses, she could have safely dropped her anchors, if at all. After the tug reached the "Edith's" bow she could not have dropped her anchors without running the risk of swinging the vessel on to the pier, stern first, and smashing the wheel and doing other damage even more serious than that which was done.

The tug captain was asked to mark on a chart the place where he started to pull on the bow line, and testified:

> "Q. Put it the way you were when you started to pull, captain.
>
> A. When I started to pull?
>
> Q. Is that about correct?
>
> A. That is about correct.
>
> Q. When you pinned that model there just now did you have in mind how close you were putting it to pier 34? Is that where you want it?
>
> A. About one hundred and fifty feet from the wharf.
>
> Q. *About one hundred and fifty feet from pier 34. You think the 'Edith' could have dropped her anchor in that position in safety?*
>
> A. *Not there.*" (314)

Captain Boster testified that the place for the "Edith" to have anchored would have been before she

got to pier 36 (214), which was before the tug took the bow line (214). Nor could the "Edith" have anchored with safety after the bow line parted.

Thus the tug captain testified:

> "Q. So that after the line was parted she could not have dropped her anchor without damaging herself?
>
> A. No, she was too close there." (314)

Thus on the tug's own theory the "Edith" could not have properly dropped her anchors before she gave the bow line to the tug. The only time at which she could under any circumstances have anchored without the danger of swinging on to the piers was before she had drifted into danger.

But to do this would have obviously interfered with such maneuvers as the tug might be undertaking. Surely it was not within the province of the tug captain to deliberately cast off the line at a place where, in his judgment, the "Edith" should have anchored to save herself. *The tug captain certainly cannot claim that when he cast off the tow preparatory to running around for a bow line, he expected the "Edith" to drop her anchors.* Would not claimant, if the "Edith" had attempted to anchor, claim that by doing so she had frustrated the operations attempted by the tug? And is there any claim that the tug thought or suggested that the "Edith" should anchor seven hundred feet from the piers? And was not the "Edith", when the tug took the operation into its own hands, justified in relying on the tug to complete it without interference?

In this connection we call attention to the testimony of the witness Boster, one of claimant's captains who testified as an expert. He was particular to say, *not* that the captain of the "Edith" *should* have dropped his anchor, but that he *could* have dropped it.

> "Q. Your idea is that she should have dropped the anchor before she ever got to Pier 38?
> A. I didn't say she *should* have dropped it; I say she *could* have dropped it." (188)

Finally, the tug here can not escape liability either in whole or in part on the claim that after the emergency had arisen that the master of the "Edith" did not take every possible step to prevent the disaster. The failure to drop anchor in an emergency, if it is an error, was, as was said in the case of the "Oceanica", "An error *in extremis* and not an act of negligence".

> *The Oceanica*, 144 Fed. 301, citing *The Steamer Webb*, 14 Wall. 406.

To the same effect is the

> *A. M. Ball*, 43 Fed. 170.

The hypercritical scrutiny of what could or could not have been done after the event has taken place is not the test of reasonable diligence or care.

> *The Wilhelm*, 47 Fed. 89.

In *The Kalkaska*, 107 Fed. 959, it was claimed the vessels which had been placed in peril by a tug could have saved themselves, but the court said:

> "We cannot think the maneuver of these two vessels, in extremis, and in the presence of impending peril, can be allowed to excuse the fault of the Kalkaska, even if different action might possibly have avoided or lessened the extent of the disaster.

> When a vessel is placed in a perilous position from the fault of another vessel she is not to be held to strict rules of navigation; in such case a mistake made in the agony of almost certain collision is regarded as an error for which the vessel which caused the peril should alone be held responsible."

Citing

The Columbia, 109 Fed. 660;

The Nichols, 7 Wall. 656.

In the latter case it was said:

> "Mistakes committed in such moments of peril and excitement, when produced by the mismanagement of those in charge of the other vessel, are not of a character to relieve the vessel causing the collision from the payment of full damages to the injured vessel."

See also numerous authorities cited in *The Columbia*, supra.

> "Where a vessel has been brought into imminent danger by the negligence of another, she may not ordinarily be condemned for any error of her master while she is in extremis, and he is endeavoring to extricate her (The Ludwig Holberg, 157 U. S. 67, 15 Sup. Ct. 477, 39 L. Ed. 620)."

The Gilchrist Trans. Co. v. Sicken, 147 Fed. 470.

The trial court made the finding that

> "the 'Edith' was not at fault for not dropping her anchor as she was entitled to believe that the 'Fearless' would care for her properly". (355)

On this point the expert and eye witnesses summoned by the claimant testified before the trial judge, to wit: Captains Boster, Randall, Gray and the tug captain. Their evidence clearly supports the finding, and the finding, we submit, should not be disturbed (infra p. 60).

VIII.

THE CAPTAIN OF THE "EDITH" WAS NOT AT FAULT FOR NOT BACKING HIS ENGINES.

Counsel argue that the master should have gone astern on the "Edith's" engines. But the testimony of all the witnesses called by the claimant who were questioned on the subject shows that it was the duty of the master to stop his engine after his stern line had been cast off, and until he had hauled that line in (supra p. 14). By the time he had his line in he had drifted into a position where he was in danger. He was then helpless, and his efforts to back his engine did not save him from striking the piers.

The captain of the "Fearless" himself testified that the tug could not have expected the master of the "Edith" to go astern on his engines after the tug cast off the tow line. He said:

> "Q. You would not approve starting an engine if there was a 20 or 25-fathom line over the stern of the ship hanging in the water?
>
> A. In what direction do you mean? Either direction? Q. Yes.
>
> A. Well, if the line was tight, it would not make any difference.
>
> Q. If it was hanging in the water?
>
> A. *No, I would not approve of it.*" (324)
>
> "Q. And if this (line) were cast off, it would naturally hang under the counter of the ship, would it not. A. Hang across the rudder of the ship.
>
> Q. With a right-hand screw turning to the right, if the line were hanging in that position and the screw turning, it would be pretty apt to foul, would it not?
>
> A. If he *didn't back* it would not foul, but if he backed *it is apt to catch on either side* if it hangs in the water." (325)

And the experts summoned by the claimant all agreed that when the line was cast adrift it was proper seamanship for the captain to stop his engine (supra p. 13).

IX.

THERE WAS A SAFE WAY OF TURNING THE VESSEL AROUND WITH THE WIND AND TIDE WITHOUT LETTING GO OF THE STERN LINE.

The claimant's witnesses admitted that the stern of the vessel could have been turned into the tide and wind so that her bow would point with the tide and wind, and she could then have proceeded on a port helm, making a complete half circle, and going up to Hunter's Point Drydock. This would not have involved the taking of any further line from the "Edith", nor would it have involved the risky maneuver of the tug dropping the stern tow line, then running around the "Edith's" bow and catching her bow line while she was drifting. It would have been, as Captain Gray, the claimant's manager, testified, a safe maneuver, although it would have taken more time (255-6). It would have involved the tug's hanging on to the stern of the "Edith" and until it was turned by the tide and wind in the opposite direction, it is true, from that in which the captain of the "Edith" intended it to be turned. But if the "Fearless" had hung on to the stern until the captain's intentions had been ascertained, or the maneuver described by Captain Gray agreed upon with the captain, the accident would not have happened. *The trouble was caused when the tug cast off the line and put the captain*

in the position where he could not pivot. The tug did this in order to perform a maneuver which proved perilous and which failed, whereas by holding the stern line it could either have aided the captain of the "Edith" in carrying out his attempted maneuver or could have led the captain into a maneuver which, as claimant's witness, Captain Gray said, would have been safe.

X.

THE TUG DID NOT USE REASONABLE CARE AND SKILL SUCH AS THE LAW REQUIRES.

> "The master of a tug is bound to use reasonable care and skill in the management of a tow and to exercise them in everything relating to the work until accomplished. The want of either in such cases is a gross fault and the offender is liable to the extent of the full measure of the consequences."
>
> *The Margaret,* 94 U. S. 494.
>
> *Gilchrist Trans. Co. v. Great Lakes Towing Co.,* 237 Fed. 432.

In the last named case the rule with reference to the duties and liabilities of tugs is fully set forth and amongst other matters the tug is charged with the knowledge of the ordinary currents and tides and impliedly warrants that she has sufficient power and ability to perform the service which is to be undertaken and the conditions which are to be reasonably anticipated. She must "Know whether under the condition then prevailing or reasonably to be expected, it is safe to make the proposed venture."

The Margaret, 94 U. S. 494, and other cases.

The tug must know all the conditions which are essential to the safe performance of her undertaking.

The Harry M. Wall, 187 Fed. 278.

In the case last above referred to the tug attempted to tow a vessel through a draw, the narrowness of which compelled the tug to cast off with the intention of taking a line again as soon as the vessel was clear. The vessel failed to respond, largely, if not wholly, because of the ebb tide setting against her starboard bow. The fundamental fault was that the master of the tug miscalculated the tide. The tug was held responsible.

In the *M. A. Lennox* case No. 8987, 16 Fed. Cases 540, the facts were peculiarly analogous to the case at bar.

There the "M. A. Lennox" towed the steamer "Corsica" out into the East River, stern foremost, then stopped, cast off the hawser, and attempted to get alongside the ship to take a second hawser from her starboard bow in order to tow her upon a hawser to her place of destination. There was evidence that the hands on the ship failed to promptly catch the heaving lines which were thrown from the tug, after the stern hawser was dropped, by means of which the second hawser was to be taken on board the tug, and this "prevented getting hold of the ship by the bow hawser in time to keep her off the piers." The tug, however, was held responsible. Judge Benedict said:

> "The maneuver, which this tug undertook to perform, was to start the ship out by a stern line and then drop it and make fast to a bow line and get headway on the ship before she would run across the river. It was a maneuver not unattended with risk, but which could have been accomplished by

> the exercise of care and skill. * * * It was the duty of the master of the tug to determine the distance he would require for his maneuver, that is, to stop, drop his stern hawser and make fast to the bow line."

The court held that the maneuver put the "Corsica" in danger, and said:

> "A ship cannot be considered as otherwise than in danger when she is drifting towards piers, and so near as to require not only great diligence, but good fortune to prevent her from striking."

And the court concluded:

> "In arriving at this conclusion, I have not overlooked the defense which has been sought to be rested upon evidence tending to show that the ship was being transported under the direction of her own master, and that in point of fact the master of the tug acted under direction of the master of the ship in determining the distance out to which the ship was taken. A careful consideration of the testimony given by the various witnesses has convinced me that there was nothing in the action of the master of the ship on this occasion which can absolve the master of the tug from the responsibility of a negligent performance of the maneuver which he undertook."

The tug was held responsible although it appeared that the master of the ship gave some orders in regard to the handling of the ship as she was coming out of the dock.

It is apparent that the operation attempted by the tug in this case was a usual method of undocking near the piers in the prevailing tide and wind. Captain

Gray said that by immediately going astern the "Edith" could have helped the tug to get into a position for a bow line and kept herself off the piers. But as the "Edith's" wheel had to be stopped until the line was in she was certain to drift close to the piers before the tug circled to her bow. It was plainly negligence for the "Fearless" to attempt the movement under the existing conditions of tide and wind.

XI.

THE VARIOUS MANEUVERS OPEN TO THE "EDITH". THE TUG'S MANEUVER CONDEMNED AS PERILOUS.

This court, we submit, will not consider the various possibilities open to the "Edith," ingeniously devised for her by counsel for appellant, and which "after the event" he "may think would have been best" (*The James P. Donaldson,* 19 Fed. 264, Appt's Br. 33). Not a syllable of testimony was tendered in respect to the various maneuvers suggested by counsel for appellant. To argue them in these briefs is to try the case on the expert opinion of counsel for the litigants, assuming a technical knowledge of navigation in which we frankly confess ourselves wanting. Three possible maneuvers were discussed at the trial, and testimony offered regarding them:

First. The maneuver intended by the captain of the "Edith", to wit, to back his ship out of the slip, to pivot it with a port helm while the tug pulled his stern to starboard, and then to proceed on his way. This maneuver, as we know, was not completed because the tug, without warning or notice, dropped the tow line.

Second. The maneuver intended by the tug, and which failed and resulted in the accident, namely, to drop the tow line and, while the "Edith" was hauling in the line and drifting, to run around to her bow and pull her into tide and wind. This maneuver failed because undertaken without notice, and too near the docks (Tug Captain's test. 339), and because no line was passed to the "Edith".

Third. The maneuver described by Captain Gray, claimant's manager (256), by which the "Edith" could have proceeded northwesterly on a port helm, making a complete turn with the tide and wind. The witness said this would have been a safe maneuver. It would not have involved dropping the tow line until the "Edith's" bow was turned into tide and wind, and she was on her way. But it was not a maneuver intended or attempted by either vessel or tug. That the "Edith" did not propose to turn the vessel in this manner is admitted; that neither the tug captain nor any of his crew proposed to assist the "Edith" in the maneuver last described is equally undisputed and clear from the testimony. It therefore is of little aid to the tug that a third maneuver was open to the "Edith" which the tug had no intention to aid her to perform, and which was not a customary maneuver under these circumstances with claimant's tug captains.

It is very clear from the evidence of the tug's captain and his crew that what the tug undertook is claimant's usual method of assisting a vessel out of the slips and up the bay. And, furthermore, it is very clear that what was here attempted to be done was exactly what

the tug proposed to do when she went to assist the "Edith" (test. tug captain, Capt. Sandstrom (330-339) and crew, Driver (142-4), Kraatz (185), supra p. 11). The libellant contended at the trial and has always maintained that it was a perilous maneuver, undertaken at the tug's risk.

The counsel for the tug themselves characterized the tug's proposed maneuver as "difficult" and claimed that that court erred

> "in not holding, deciding and decreeing that the accident and the resulting injury and damage to the 'Edith' were due to *the negligence and fault of the 'Edith' herself in compelling the 'Fearless' to undertake said difficult maneuver.*" (Assignment of Errors, 19, Rec. 309)

In other words, counsel claimed that the 'Edith' was guilty of negligence in compelling the tug to undertake a maneuver which the tug intended to perform before the "Edith" left her slip!

As we have seen, if the tug had held on to the "Edith's" tow line, the operation attempted would never have been put under way. But can the tug escape responsibility for the results of a "difficult" maneuver which the tug assumed to perform pursuant to her captain's plans merely because the "Edith" did not block the performance? By charging the "Edith" with negligence for forcing the tug into this maneuver, claimant convicts the tug, which as the record amply shows, *at no* stage of the operation intended or attempted any other maneuver.

XII.

THE "EDITH" IS NOT ESTOPPED; THE TUG'S MANEUVER WAS NOT ADOPTED BY THE "EDITH".

Appellant's brief is predicated on the theory that the captain of the "Edith" assumed responsibility for the tug's maneuver because he did not object to it. The entirely new theory is now advanced in the case that after the tow line was cast off from the tug into a tide running three miles, with an eighteen mile gale blowing, the "Edith", instead of hauling in the line as rapidly as possible, should have stopped her engines (she could not turn them without danger of fouling her wheel while the line was in the water (supra p. 38) and while thus drifting, signal to the tug, which dropped her tow a few hundred feet from the piers, to fish for the line—"with its boat hook from its tow stern" (Appt's Br. 14), suggests counsel for appellant.

The statement that the line "lay in the water without slack" (Appt's Br. 14-15) is contrary to the evidence. The line was taken off the bitts, and the bight in it was so great and wind and tide so strong that the deckhands could not hold on to it (supra p. 18, tug crew Kraatz (162), Driver (147), Taylor (192)).

The claim that the "Edith" should have directed the tug to again pick up the line (after the tug cast it off without notice), or be held responsible for the outcome of the tug's perilous maneuver, is, we submit, as inadmissible as it is new in the case. Not an intimation of such a defense is offered in the answer to the libel; not an insinuation of the kind is found in the assignments of error; not a syllable of testimony was offered

that such a thing could have been done under the weather conditions at the time, or that it should have been attempted. The captain of the "Edith", his own maneuver having been rendered impossible by the action of the tug, naturally and properly left the next step in the operation to the action of the tug. He is not to be blamed, we submit, for not instructing the tug to attempt to recover the line which it had just cast off. The trial court, we submit, properly found that the master of the "Edith", after the tug took matters out of his hands, and without his orders, was entitled to rely on the tug's completing what it had undertaken.

We take it that had the master of the "Edith" ordered the tug to attempt to pick up the cast off line, and had disaster ensued in the attempt, he would have been justly blamed. He can not be said to have adopted a maneuver which he could not prevent or stop; the line was cast off without warning, and his engines had to be stopped at once. No court has yet held, we take it, that a vessel which is placed in *extremis* by a tug that drops its tow without notice, acquiesces in the tug's maneuvers because it does not attempt to frustrate them.

The cases cited by counsel in support of the claim of "estoppel" on the part of the "Edith" all involved an expressed adoption by the complaining vessel of a maneuver resulting in the accident. This appears from an examination of the authorities cited.

The Santa Maria, 227 Fed. 149 (Appt's Br. 38), In this case two tugs, the "Sweepstakes" and the "Mehrer", were held jointly responsible for negligence

in navigation. The "Sweepstakes" signaled her proposed course for passing the "Mehrer", and the "Mehrer" answered the signal and agreed to the maneuver. It was held that the "Mehrer" having agreed to the maneuver and attempted to execute it, could not complain of the "Sweepstakes'" conduct.

The Luther C. Ward, 149 Fed. 787 (Appt's Br. 38). In this case two tugs attempted to pass each other by going to starboard, with the result that the tow of one collided with a dredge. The first tug, the "Tice", signalled her proposed course with two blasts, and the "Ward" responded with two blasts, indicating that she agreed to the proposed maneuver. It was held that the "Ward" could not then throw sole responsibility on the "Tice" for proposing the operation.

In *The Luckenback,* 124 Fed. 947 (Appt's Br. 38), the facts were similar to those in the last cited case, except that here the "Luckenback", after answering the signals of another tug, the "Flint," failed to complete the agreement thus reached between them. It was held that the "Luckenback" was not entitled to claim that the "Flint" was negligent, but that having adopted the course proposed for both tugs by the "Flint", should have been vigilant in completing it.

In the case of *The Albemarle,* 1 Fed. Cas. 299, 9 Blatchford 200 (Appt's Br. 39), there was a collision between the "Albemarle" and the "Brady", approaching each other from opposite directions. The "Brady" blew one whistle to signify her intention to pass to the right. The "Albemarle" responded with one whistle, indicating her assent. Thereupon the "Brady" ported.

There was a dispute as to whether the "Albemarle" ported or starboarded. The court held that both vessels should have ported at an earlier stage. In the course of the opinion, the court said:

> "I do not say that the Albemarle, by assenting to the signal of the Brady to port the helm and go to starboard, is estopped to allege that it was wrong in the Brady to do so, or that, in a sudden exigency, caused by the fault of another vessel, she is to be held accountable for an erroneous judgment formed on the instant. But here the Brady gave the signal and waited a reply. That reply assured her that the approaching vessel concurred with her in her opinion as to what was required of both. Then, and not until then, she ported her helm, and the Albemarle did the same."

The distinction between the cases relied upon by counsel and the case at bar is well marked in this decision. The mere assent to an erroneous or perilous maneuver given on the spur of the moment, or in the exigencies of a situation, should not create an estoppel against the vessel so assenting. In all the cases relied upon by counsel for appellant the vessel assenting to a maneuver which resulted in a disaster was held to be estopped by its assent *only* where the assenting vessel had been notified of the proposed maneuver, and had expressed her concurrence in it and willingness to undertake it.

The court in the case of the "Albemarle" was particular to point out that the "Brady", before swinging to port, not only gave a signal, "but waited a reply", and, as the court says, "then, and not until then, she ported her helm." The "Albemarle" was held estopped because her assent was given "in no sudden exigency,

for the 'Brady' did not change until the assent of the 'Albemarle' thereto (to port) was given." And this is precisely the distinction which we here urge upon the court. The tow rope in this case was cast off by the tug without warning. It would have been easy, as counsel for appellant points out, for the master of the tug to have inquired of the mate of the "Edith" whether the rope was to be cast off. After it was cast off, if it is conceivable that the master of the "Edith" should have directed the tug to recover the rope in the tide and the wind then prevailing, the most that could be said is that such a determination could have been reached by the master in the exigency of the case, and his failure to give the order would not constitute an assent to the tug's maneuver. It is because the tug failed to do in this case what the "Brady" did in the "Albemarle" case, namely, to signal her intention and wait for the "Edith's" reply, that we conceive that no question of estoppel can arise against the "Edith".

So in *The Arthur L. Palmer,* 115 Fed. 417 (Appt's Br. 39), it was held that where a vessel *assents by signal* that another shall cross her bows, she cannot urge the attempted maneuver as a fault.

In *The San Rafael,* 141 Fed. 270 (Appt's Br. 39), it was similarly decided that after the "Sausalito" had answered the signal of the "San Rafael to pass to port, the "San Rafael" having blown two whistles and the "Sausalito" having answered, neither vessel could escape responsibility for the maneuver which was a negligent undertaking.

In *The Electra,* 139 Fed. 158 (Appt's Br. 39), a steamer and lighter collided after exchanging signals to pass to the right, and each was held at fault for waiting too long in carrying out the maneuver.

The Transfer No. 9, 170 Fed. 944, and *The Columbia,* 195 Fed. 1000 (Appt's Br. p. 40). In both of these cases vessels which exchanged signals and thus agreed to the maneuver signalled, were held to have assented to the maneuver.

We have examined and here commented on all of the cases cited by counsel in support of the alleged "estoppel" in this case. We submit that none of them sustains the extraordinary proposition that the master of a steamship is estopped from charging a tug with negligence or that he must be held to adopt the tug's action because he fails to direct the tug to recover a tow line, which the tug has cast off without signal or notice in a gale of wind and a swiftly running tide.

Counsel argue with some elaboration that the "Edith" left the tug in ignorance of the fact that she could not turn her wheel—that the vessel was converted to a "hulk," etc., etc. But the tug's crew, as counsel for appellant points out, were within easy speaking and seeing distance of the "Edith's" stern. Furthermore, the tug *expected* the "Edith's" wheel to remain still, during the time the line was hauled in (supra p. 12), a sufficient time for the "Edith" to drift into danger (supra p. 15).

To the suggestion that the tug acted in an emergency and is not chargeable with gross negligence (Appt's Br.

33), we answer that the maneuver the tug attempted was not undertaken in an emergency, but was the precise operation she intended to perform when she left the slip. Her captain and crew so testified (supra, pp. 11 et seq.).

XIII.

THE ALLEGED FAILURE TO PRODUCE TESTIMONY.

Counsel direct much of their argument to the alleged "failure" to produce the logs of the "Edith", and to the fact that more of the "Edith's" crew were not called as witnesses.

The only references to the log books of the "Edith" contained in the apostles on appeal are a half dozen questions and answers concluding with the following:

> "Q. The log books remained on the vessel?
> A. I imagine they did.
> Mr. McGrann. I called for a production of the log books bearing on this occurrence." (48)

The call was at the time of the taking of the deposition of the witness Henry McDonald in New York City on the 28th day of March, 1917, being approximately three months prior to the trial of the action. It does not appear that appellant's counsel ever thereafter considered the question of the production of the log books and *non constat* from the record the books were in fact produced and examined by appellant's counsel.

Admiralty Rules 35 and 36 of the United States Supreme Court provide for demand and notice for the production of writings and for orders with respect thereto.

There was no order of court ever made for the production of these books, and even if libellant had failed to produce the logs, there was no duty resting upon libellant to produce them in the absence of an order of court or a written notice as required by these rules.

The Washtenaw, 163 Fed. 372;

Havemeyer, etc. v. Compania Transatlantic, etc., 43 Fed. 90.

But in any event the point raised is highly specious. It is quite apparent that the log books could have had no bearing on the issues of fact tried before the court. The facts in regard to the movements of the "Edith" are entirely undisputed, except perhaps as to the single circumstance that some of the tug's witnesses thought the "Edith's" propeller was turning when the stern tow was cast off—others thought the wheel was not moving.

The maneuver contemplated by the captain of the "Edith" is not in issue; that the tug dropped the tow rope is admitted; that the tug intended to run around the "Edith's" bow and take a tow line while she was drifting, is testified to by the tug captain himself and his crew, and is not disputed; that the tug failed to pass up a line while the "Edith" was drifting is not denied; that the line passed out in the emergency by the "Edith" from her bow failed to hold and was not a good line, is not disputed; that the tug had lines which it could have passed is not denied; that it failed to pass them because they were not specially contracted for is testified to by the manager of the claimant; that the "Edith" asked the tug for a line is denied by

the tug captain, but testified to by two members of the tug's crew, who heard the request, and is expressly averred in the claimant's answer; that the wind and tide were strong and caused the "Edith" to drift rapidly is alleged in the answer of claimant and not denied; that the "Edith" failed to anchor, fearing thereby to embarrass the tug's maneuver, is not disputed; that the "Edith' was right in not turning her engines while the line was in the water is admitted and characterized as good seamanship by the tug's witnesses; that while thus compelled to stop her engines she drifted into danger is admitted by various of claimant's witnesses; that the tug captain failed to consult the "Edith's' master is not denied; that he took the stern line in an operation in which he was to "assist" the "Edith" and cast it off without an order from or notice to the "Edith" is not denied.

What possible light or relevancy could the ship's logs have on these circumstances, or on the facts of the case on which it was tried? And why should either counsel have wished to use the logs?

Is not counsel plainly grasping at a circumstance in this case of no significance, undoubtedly contrary to the fact, and endeavoring to draw from it the sinister inference attached to the suppression and mutilation of evidence in the cases cited by him? *Is it not entirely probable that so astute and experienced a practitioner as the counsel who tried the case below would have brought the demand for the logs, if these had been withheld from inspection, to the attention of the trial court, or would have had the record show a refusal to produce*

them? Is it not equally probable that he would have offered them in evidence or excepted to the refusal (if there was a refusal) to produce them, if they could have had any bearing on the case? And not having done so, should the failure to respond to a demand for evidence which claimant thought it unnecessary to press, be seized upon and urged upon this court? Would it be fair to counsel or the trial court to even consider an alleged failure to produce evidence for which no request was made at the trial, which was never asked for except on the taking of a sealed deposition, taken months before the trial and which deposition was offered in the case without reading? Are such objections considered as grounds for reversal on appeals to this court in admiralty? We submit they are not.

Similarly, what possible light could other witnesses from the "Edith" have thrown on this case? The movements of the "Edith" are not in dispute, although the facts as to the turning of her wheel, which was in plain view of the crew of the tug, were the subject of various theories advanced by claimant, whether in the answer, or that proven by some of the tug witnesses, or that proven by others, or that now taken on the appeal. The difficulty of producing the other witnesses from the "Edith" was obvious from the master's deposition (48); and while this in a proper case might be no excuse, the uselessness of doing so here, is apparent from the fact that no single fact to which they could have testified would have aided in fixing the responsibility for this accident.

While the record here contains nothing to sustain the contention that the logs were not offered, it is apparent from the authorities that even if there had been a failure to produce the logs, or to call further witnesses from the "Edith", these circumstances would be considered by the court only if it appeared that the logs or other witnesses could throw light on material facts in the case. Such is the effect of the decisions cited by counsel.

They are the following:

The Sicilian Prince, 128 Fed. 133 (Appt's Br. 40). Here the trial court found that log books which had been produced by the vessel were intentionally made in meager fashion. A page falling between two relevant dates in the case *had been cut from one of the log books,* and no explanation for the mutilation offered. Obviously the court was justified in drawing an unfavorable conclusion.

The Prudence, 191 Fed. 993 (Appt's Br. 41). The mate in the pilot house at the time of the collision was not summoned as a witness—which the court said was matter for observation.

The Santa Rosa, 249 Fed. 160 (Appt's Br. 41). The proceeding was to limit the liability which arose out of the wreck of the steamer at Point Arguello on the Pacific Coast. The opinion shows that:

> "During the trial the production of these logs (that is, the logs of the vessel) was demanded by claimants and petitioner promised to produce them. This was not done, so that it may at least be assumed that their production would not have helped petitioner's case."

One issue in that case was whether or not the "Santa Rosa" was navigating at the time of the disaster with the course and speed of the vessels of the fleet of which she was one, usual upon the run in question. The fog and weather conditions prevailing would have rendered her conduct in proceeding in the usual manner, negligent. The trial court observed that the failure to produce the vessel's logs, "requested and promised", would indicate that her course and speed were the usual ones. The logs, therefore, would go to the very gist of the case, and the failure to produce them after they were promised would obviously be a circumstance against the vessel. The opinion cited by counsel for appellant in the "Santa Rosa" case was rendered by the learned Judge who tried the case at bar. The report shows that his opinion was delivered on February 20, 1918. The memorandum opinion of the trial court in this case was filed February 8, 1918 (299), twelve days before the opinion filed in the case of the "Santa Rosa". *Is it conceivable that the judge of the court below would have drawn so strong an inference against the "Santa Rosa" from the failure to produce her logs, and yet have completely overlooked the fact that the logs of the "Edith" in the case at bar were not produced, if their production had in point of fact been refused, or if the logs themselves were of any moment in the case?*

The New York, 175 U. S. 187 (Appt's Br. 41). Signals and lights were overlooked by the "New York". There was a charge that there was a defective lookout. None of the officers or crew of the "New York" were put on

the stand to explain why the blasts were not answered or lights observed, and the failure to explain this negligence was the proper subject of an unfavorable deduction by the court.

The Alpin, 23 Fed. 815 (Appt's Br. 42). The vessel had stranded. None of the officers or crew, twenty-nine in number, nor the two passengers, many of these eye-witnesses to the stranding, were called to the stand. Naturally the court drew an unfavorable inference.

Clifton v. United States, 4 How. 242 (Appt's Br. 42). The case involved liability for fraudulent importations. The importer failing to produce his account books, although they were frequently demanded. This was properly held to militate against him.

The Fred M. Laurence, 15 Fed. 635 (Appt's Br. ib.). It was admitted there was perjury on one side or the other, and the failure to call the single witness who could have cleared up the essential fact in the case, was held to create an adverse suspicion.

The Bombay, 46 Fed. 665 (Appt's Br. ib.). The proceeding was one to charge the vessel with a fine for dumping ashes into the Bay of New York. It was noted by the court that the firemen who did the dumpiing were not produced.

The Georgetown, 135 Fed. 854 (Appt's Br. ib.). It was said that the failure to produce witnesses likely to know of the circumstances of a collision weakens the case of a vessel where there is a direct conflict amongst the witnesses.

The Sandringham, 10 Fed. 556 (Appt's Br. ib.) The action was a salvage case. The court observed that three witnesses for the ship

> "discredit their own testimony by statements singularly untrue, and I have no choice but to reject it when it is in conflict with the evidence of the wrecking officers; and their testimony is the more open to distrust from the fact that the first mate of the ship was not examined *on the principal points in dispute*". (Italics ours.)

The Gladys, 135 Fed. 601 (Appt's Br. ib.) A collision case. One of the vessels called no witnesses, and the court observed that the failure to take the testimony of those navigating a tug in a suit for collision tends against her *in the absence of equivalent testimony.*

The Freddie L. Porter, 8 Fed. 170 (Appt's Br. ib.). The vessel failed to call the lookout and wheelman on duty at the time of the collision, and this was held to be open to remark, the only witnesses produced being the mate, whose story the court found could not be accurate.

These are all of the authorities cited by counsel. In none of them (nor, indeed, in any others that we have been able to find) is it indicated:

First: That there is a presumption that the demand for the log books of a vessel was refused, because the record does not affirmatively show that the logs were produced. Indeed it may well be that in this case the logs, or copies thereof, were exhibited by counsel for claimant during the progress of the trial, and that he

considered them of as little consequence on the issues involved in this case as did counsel for the libellant.

Second: That any significance is to be attached to, or unfavorable inference be drawn from, the fact that some members of the crew of a vessel were not produced as witnesses, unless it appears in some manner that their testimony would have thrown some light on the issues in the case, or that they could have shown some relevant, if not important, fact.

XIV.

DESPITE ANY CONFLICT OF EXPERT OR OTHER TESTIMONY, THERE IS AMPLE EVIDENCE IN THE RECORD TO SUPPORT THE FINDINGS OF THE DISTRICT COURT, AND THE WELL ESTABLISHED RULE OF THIS COURT, THAT FINDINGS OF FACT WILL NOT BE REVERSED WHERE THE TRIAL COURT HEARD THE EVIDENCE, SHOULD OBTAIN.

The decision of a trial court in admiralty, on questions of fact, based upon conflicting testimony or the credibility of witnesses examined before the judge, is entitled to great respect and will not be reversed unless manifestly contrary to the evidence.

1 C. J., Par. 314, p. 1351.

On appeal in admiralty an appellate court will not reverse the decision of a district judge upon conflicting testimony, where all or a major part of the evidence was presented in open court, as under such circumstances the district judge, having the opportunity to see the witnesses and observe their appearance and manner, is in a better position than is the appellate

court to weigh their evidence and determine the credibility which should be given to the testimony of the respective witnesses.

This rule was applied by the Circuit Court of the Ninth Circuit in *The Hardy*, 229 Fed. 985, opinion by Gilbert and Ross, Circuit Judges, Rudkin, District Judge, concurring. The court said:

> "The court below found upon testimony, the most of which was taken in open court, that the steamer was not responsible for the parting of the hawser * * *; While there are many features of the evidence which tend to discredit the testimony of the officers and men of The Hardy * * * we are not convinced that the record is such as to take the case out of the well settled rule which has been followed by this and other courts, that in cases on appeal in admiralty when questions of fact are dependent upon conflicting testimony, the decision of the District Judge who had the opportunity to see the witnesses and judge of their appearance, manner and credibility, will not be reversed unless it clearly appears to be against the weight of the evidence."

Citing: *The Alejandro*, 56 Fed. 62, 71; *Perriam v. Pacific Coast Co.*, 153 Fed. 140; *Peterson v. Larson*, 127 Fed. 617.

This rule is particularly applicable to the instant case, where all the *appellant's witnesses* were heard in open court.

In *The Dolvadarm Castle*, 222 Fed. 838, Circuit Judge Gilbert, speaking for the court, said:

> "It is contended that the evidence failed to show that the damage was caused by perils of the sea. In considering this contention it is to be observed

> that all of the testimony of the *appellant's* witnesses was heard in open court, and that the only testimony offered on depositions was that of the officers of the barge. The well settled rule is applicable, that the findings of fact of the trial court will not be disturbed in this court, unless it clearly appears that there was error."

Citing: *Whitney v. Olsen,* 108 Fed. 292; *Perriam v. Pacific Coast Co.,* supra; *The Bailey Gatzert,* 179 Fed. 44.

> "Whether negligence imputed is a proximate cause, or merely collateral or immaterial, is a question of fact, and where the conclusion of the District Court is not against the preponderance of the evidence it cannot be disturbed."

The Curtin, 217 Fed. 245, 247. Citing: *The Oregon,* 158 U. S. 186; *The City of Macon,* 92 Fed. 207; *The Lord O'Neil,* 66 Fed. 77; *Marsden on Collisions at Sea,* 6th Edition, 14. See, also, *The Sampson,* 217 Fed. 344, 347; *The Elenore,* 217 Fed. 753. See, also, *The Belgenland,* 114 U. S. 355, 357; *The Tornado,* 119 U. S. 110, 115; *Irvine v. The Hesper,* 122 U. S. 256, 266.

The burden is on the appellant to show that the decree of the subordinate court is erroneous.

The Lady Pike, 88 U. S. 1, 8.

The case would be otherwise were the appeal by the libellant, whose witnesses have been heard upon depositions.

The Santa Rita, 176 Fed. 890, 893.

Appellant cannot complain that its case was not supported by the testimony of its own witnesses, when they were heard in open court. There is therefore nothing in this appeal to take the case out of the ordinary rule, that the decision of the district judge in admiralty upon

questions of fact will be accepted by the appellate court, unless the evidence clearly preponderates against it.

Geary etc. v. Dunseith, 239 Fed. 814, 816.

In the case at bar the trial court received the depositions of the "Edith's" officers and heard the testimony of the crew of the tug, of the superintendent, manager and other employees of the claimant, who testified as experts.

The court decided the disputed issues, such as whether the line was cast off by the tug while the "Edith's" wheels were turning, whether the tug was prepared with a sufficient line, whether the "Edith" was at fault for not dropping her anchor, whether the "Edith" was entitled to rely on the tug, against the claimant.

Similarly, the trial court listened to much testimony on the issue whether the "Edith's" captain properly "planned the maneuver", the point which is so conspicuously and elaborately considered in appellant's brief and much expert testimony on this subject was offered. In brief the case was tried as to all essential defenses by the tug *viva voce.*

We submit the court's findings should stand, and that the judgment should be affirmed.

Dated, San Francisco,
October 24, 1918.

Respectfully submitted,

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